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Supreme Court of the United States

OCTOBER TERM, 1952

No. 340

WILLIAM B. FOWLER, APPELLANT,

vs.

STATE OF RHODE ISLAND

APPPEAL FROM THE SUPREME COURT OF THE STATE OF RHODE ISLAND

FILED SEPTEMBER 17, 1952
Probable jurisdiction noted November 10, 1952

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DEC. 4, 1952.

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[fol. 1]

IN THE SUPREME COURT OF THE STATE OF RHODE ISLAND

Ex. &c. No. 9264

STATE

v.

WILLIAM B. FOWLER

OPINION

FLYNN, C. J.:

This is a criminal complaint charging the defendant with violating section 11 of chapter 149 of the ordinances of the city of Pawtucket by making an address to a religious meeting in a public park owned and maintained by that city. The case was tried first in the tenth judicial district court and following defendant's conviction and sentence he duly appealed to the superior court. However, before trial and by leave of court defendant filed a motion to quash the complaint. Thereupon the superior court certified to this court for determination, in accordance with general laws 1938, chapter 545, § 6, as amended by public laws 1940, chap. 941, sec. 2, certain questions of doubt and importance as to the constitutionality of the ordinance.

Upon consideration thereof we held in substance that the ordinance on its face was not designed to interfere with defendant's rights of freedom of speech, or of assembly, or of religion; that it was part of a regulatory and nondiscriminatory ordinance which was enacted many years ago to secure the maximum reasonable and orderly use of the park by the public for rest and recreation; that in effect it was similar in purpose and principle to the one which was involved in the case of *Davis v. Massachusetts*, 167 U. S. 43; that, since the unequivocal statement of law in the [fol. 2] *Davis* case had not been overruled by the United States supreme court, we could not say beyond a reasonable doubt that the ordinance here was unconstitutional and in violation of the first and fourteenth amendments to the United States constitution; and further that it did not vio-

late similar guaranties of such rights, in the constitution of this state. *State v. Fowler,* · R. I. , 83 A. 2d 67.

Accordingly the case was remitted to the superior court where, after a trial *de novo* in which jury trial was specifically waived, defendant was convicted and sentenced to pay a fine of $5 and costs. Thereupon he duly prosecuted his bill of four exceptions to this court, but only the first, second and fourth are now being pressed. The third, being neither briefed nor argued, is deemed to be waived under our practice.

The evidence is either admitted or not disputed. The defendant is a resident of Arlington, Massachusetts, and is a minister of the group known as Jehovah's witnesses. He was invited by the local or Pawtucket members of such group to deliver a bible discourse to their assembly to be held in Slater Park on September 3, 1950. The city of Pawtucket owns that park, which has an area of approximately 194 acres and is situated in the residential section of the city. For a great many years it has been maintained as a public park having a variety of facilities for rest and recreation. These range generally from tennis courts to formal gardens. The mere assembly of a group of people, excluding, however, any public address with or without the aid of a sound-magnifying device, could be held without unduly interfering with the use of the park by others.

[fol. 3] From 1916 to date use of the park has been regulated in the public interest by the ordinance in question and a nondiscriminatory administration thereof. That ordinance, chapter 149, contains sixteen sections, many of which are unrelated to the exercise of constitutional rights. It appears in full as an appendix to our previous opinion in this case, to which reference is hereby made. *State v. Fowler, supra.* Section 11 thereof, which is at the base of the instant controversy, reads as follows: "No person shall address any political or religious meeting in any public park; but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park."

The local members of the group had received permission previously to hold religious assemblies and had used the

park for such purposes on two preceding Sundays. However, contrary to the express terms of the ordinance, defendant on September 3, 1950 began to address about 400 persons who had assembled there for a religious meeting. Approximately 150 of the assembly constituted members of the religious group and the other 250 were strangers who had come as invitees to such meeting. The latter probably were not residents of the city.

It is not disputed that defendant began to address the meeting with the aid of a microphone and *two* "loud speaker" devices; that he thus proceeded with his address sufficiently to define its religious character before interruption by the police; and that the address as made was admittedly contrary to the literal provisions of the ordinance. After being interrupted politely by the police, defendant was invited to go to the police station where the [fol. 4]. instant complaint was sworn out and the warrant was issued for his arrest. There is no question of intimidation, excessive force or lack of courtesy on the part of the police before, during or after the meeting. The contrary is admitted.

When the trial was about to commence defendant, with permission of the superior court, made a motion to quash, orally and in writing, on the grounds that the ordinance on its face and as construed and applied is unconstitutional in that it abridges the rights of defendant to freedom of speech, freedom of assembly and freedom of worship, contrary to the provisions of the first and fourteenth amendments to the constitution of the United States and to the provisions of sections 3, 10, and 21 of article I of the constitution of Rhode Island. This motion was denied and is the subject of defendant's first exception.

The defendant concedes in his brief and argument that such motion is based on the identical grounds and raises the same constitutional questions as those involved in the certification which was decided by this court in *State v. Fowler, supra.* However, he insists that in such opinion we have misconceived the applicable law and have failed to follow the mandate laid down by the United States supreme court in many cases which he again cites; and that we have erroneously relied upon the *Davis* case which is either not the law or not in point. Especially he now em-

phasizes the cases of *Jamison v. Texas*, 318 U. S. 413, *Commonwealth v. Gilfedder*, 321 Mass. 335, to show the earlier case of *Davis v. Massachusetts, supra*, is longer the applicable law of the United States in the cumstances here.

In view of the strong argument on this point we have examined the many cited cases but we fail to find whe [fol. 5] any of them lays down an express mandate req ing a different conclusion from the one which we reac and expressed previously on the basis of the pertinent unanimously enunciated by the United States supre court in the *Davis* case. In our judgment that case c cerned an ordinance which in substance and effect is si lar in principle and purpose to the one involved in the stant case. It was part of a general ordinance designed control and regulate a common or park which was ow by the state or city and was maintained for the general c venience and comfortable use of the public as a wh Likewise as part of the regulation it permitted in practi effect what amounted to a prohibition of all religious a political addresses to assemblies in that public common park, much as we have expressly in the ordinance und consideration herein.

Consequently the *Davis* case is clearly distinguisha from *Jamison v. Texas, supra*, which is relied on by defe ant. There, among other provisions, the ordinance ma it unlawful "to scatter or throw any handbills, circula cards, newspapers or any advertising device of any descr tion, along or upon any street or sidewalk in the city Dallas." Nothing in that ordinance purported to make unlawful *to distribute* religious pamphlets, and yet t gravamen of the complaint there, as viewed from the e dence, was directed *solely* to the defendant's *distributi* of religious treatises which had on the back a reference a book which could be purchased if desired. Therefore the face of the ordinance and on the facts that case is d ferent from the *Davis* case.

Moreover the ordinance in *Jamison v. Texas, supr* differs still further from the one in the instant case in th the ordinance here expressly recognizes the right of r ligious groups to assemble and nowhere makes it unla [fol. 6] ful to distribute religious pamphlets or to ho

religious meetings and services. Therefore the *Jamison* case does not appear to us to carry any mandate, express or implied, that is applicable to the ordinance and facts of either the *Davis* case or the one now before this court.

It will serve no useful purpose to repeat what was said previously in our opinion on the certification concerning the numerous cases relied on by defendant, except perhaps to observe that we find it difficult to determine precisely which of the principles of law as stated in certain of the main opinions are actually concurred in by a majority of the justices of the United States supreme court. Likewise in those cases it becomes hard to know, in view of language in the several concurring and dissenting opinions, to what extent some statements of law in the main opinions may have been restricted or inferentially overuled in later cases.

We may again point out, however, that in the *Davis* case the supreme judicial court of Massachusetts unanimously and unequivocally stated the law applicable to the right of an individual member of the public to use a park or common that is maintained and regulated by the state or municipality for use by the public as a whole, and that such statement of the law was expressly approved and incorporated as part of the opinion of the United States supreme court in *Davis v. Massachusetts, supra.*

Further the supreme court of the United States added thereto the following statement of the law which was unanimously concurred in: "It is, therefore, conclusively determined there was no right in the plaintiff in error to use the common *except in such mode and subject to such regulations as the legislature in its wisdom may have deemed* [fol. 7] *proper to prescribe.* The Fourteenth Amendment to the Constitution of the United States does not destroy the power of the States to enact police regulations as to the subjects within their control * * * *and does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the constitution and laws of the State.*" (italics ours)

That case, though frequently cited to the supreme court of the United States, has not been expressly overruled by that court. On the contrary it has been distinguished in some form from cases in which it was cited. Ordinarily a court does not distinguish one of its own cases if it really

intends to overrule it and to hold that such case no longer states properly the applicable law of that jurisdiction. Moreover it is reasonable to expect that if and when the United States supreme court actually intends to overrule the express statements of law in the *Davis* case, it will reserve to itself the right to do so in equally unmistakable language for the guidance of other courts which must conform to that court's decisions.

But the defendant nevertheless argues that the *Davis* case has been nullified and in effect overruled by implications to be gathered from statements in certain of the cases decided by the United States supreme court and discussed in our former opinion. He urges that the decision of the supreme judicial court of Massachusetts in the case of *Commonwealth v. Gilfeder, supra,* shows a proper conception of the effect of those decisions and states the law presently governing cases of this kind. Apparently the Massachusetts court in that case did not adhere to the law previously stated by it in the *Davis* case, which had unanimous approval by the United States supreme court.

[fol. 8] It is significant, however, that the Massachusetts court did not overrule its own decision in the *Davis* case and expressly conceded that it could not find a case where the supreme court of the United States had overruled its approval of that case. Furthermore it may be noted that the supreme judicial court of Massachusetts appears to have applied elsewhere, with reference to a certain decision of the United States supreme court, the principle that any change by way of extension in the ruling of the case then under consideration "must come from the court which first pronounced that doctrine." *Sherrer v. Sherrer,* 320 Mass. 351, 359. We agree with that pronouncement. By analogy here, if the explicit ruling of law in *Davis v. Commonwealth,* 167 U. S. 43, is to be overruled, it should come only from the United States supreme court.

At any rate the difficulty which we have with the procedure indicated by that opinion is twofold. We are bound to follow the supreme court of the United States in its decisions relating to the law governing the United States constitution. But we are not bound necessarily by another state court's interpretation of or implications from the decisions of the United States supreme court. Secondly,

we cannot believe it to be a sound constitutional principle to leave the law applicable to the United States constitution to broad implications drawn generally by state courts from opinions of the United States supreme court. Conceivably on such a basis there could be forty-eight different deductions or inferences as to what each state court thought a decision of the United States supreme court really meant and as to the limitation, if any, on the exercise of such a constitutional right which, according to a particular state court's deduction, had the concurrence of a majority of the [fol. 9] United States supreme court. In our judgment that is not a desirable or helpful substitute for an authoritative and objective guide which the state courts are expected to follow in such important determinations.

On the other hand, if such a practice were to be adopted, then even if all state courts were in agreement on a particular conclusion deduced inferentially from language in certain opinions of the United States supreme court, the latter, which alone has the sole prerogative of determining questions relating to the United States constitution, might well say that a majority of that court had never overruled the *Davis* case; that such case had always been distinguished without intending to overrule it; and that it still is applicable law in the type of case where the question involves only the defendant's right, as a member of the public, to speak in a manner and under conditions which would violate the equal and correlative rights of other members of the public to a reasonable use of the park for its dedicated purpose. In our judgment, for all that appears in the cases thus referred to by the defendant and discussed in our previous opinion, there is nothing which would prevent such conclusions by the United States supreme court.

In that connection it is interesting to note the case of *Commonwealth of Pensylvania v. Geuss*, 168 Pa. St. 22, which was affirmed by the supreme court of Pennsylvania in 368 Pa. 290, and in which certiorari was denied by the United States supreme court since the argument herein. *Geuss v. Pennsylvania*, 342 U. S. 912. There the supreme court apparently did not feel constrained to interpret in the manner urged by defendant here the statements of principles appearing in certain opinions of the United States supreme court. The Pennsylvania supreme court did not

read such opinions as compelling a conclusion that an ordi-
[fol. 10] nance must be invalid if, as part of a reasonable regulation, it purports to prohibit an individual from exercising a constitutional right of freedom of speech in a public place. While that case involved an ordinance prohibiting the use of sound trucks on public highways, whereas here we have the use of two "loud speakers" in a small public park in a residential section of the city, yet the underlying principle of prohibiting a constitutional right as part of a reasonable regulation in the public interest is analogous to the regulation in the ordinance as construed and applied in the instant case.

Further, defendant's claim leads to discrimination. It would create in him, as one member of the public, a paramount right whereby he may insist not only that the park be maintained at public expense as a forum for the exercise of his constitutional right but also that he may exercise such right with the aid of sound-magnifying equipment so as necessarily to abridge or destroy the equal and correlative rights of others. Granting his constitutional right to freedom of speech, others also have an equal constitutional right not to be compelled to listen and not to be forced to attend a religious meeting and, as members of the public generally, not to have another person destroy their rights to use the park for its dedicated purposes of rest and recreation. We think that the unequivocal statement of the law as it appears in the *Davis* case is sound, reasonably protects the rights of defendant and others, and should be applied here. In our opinion defendant's right is not paramount to the rights of all others and its exercise is not to be indulged without reasonable limitation. Such a right ceases
[fol. 11] to be employed in a reasonable manner when in the nature of things its exercise, as here, is bound to abridge or destroy the equal constitutional rights of other members of the public.

At any rate in the circumstances we fail to find wherein the applicable constitutional law of the United States has been stated so clearly that it amounts to a mandate, as urged by defendant, or that would constrain us to reach a result different from that which we expressed in our previous opinion when the case was before us on the certified questions. *State v. Fowler, supra.* On the contrary we

prefer to apply the recognized rule which prohibits a state court from striking down a legislative enactment unless it appears beyond a reasonable doubt that it violates a particular provision of the constitution of the United States or of this state. So long as the unequivocal statement of law by the supreme court of the United States in the *Davis* case is left standing without a reasonably equivalent statement modifying or overruling it, we find it impossible to say beyond a reasonable doubt that the nondiscriminatory and realistically regulatory ordinance in the instant case is unconstitutional for the reasons asserted by the defendant. The defendant's first exception is therefore overruled.

The motion to dismiss, which is the subject of defendant's second exception, has no place in our practice and for that reason could be overruled. However, it admittedly involves the same essential question of law which has been discussed and decided in our previous opinion and also herein under the plaintiff's first exception. Likewise the defendant relies on the identical question under his fourth exception, [fols. 12-13] because there is no dispute as to the evidence that the defendant is guilty if the ordinance is valid. These exceptions are therefore overruled.

For the reasons stated, all of the defendant's exceptions are overruled, the decision and conviction are affirmed, and the case is remitted to the superior court for further proceedings.

BAKER, J., dissenting:

I am unable to agree with the opinion of the majority of the court. This is the same case which was recently before us on certified constitutional questions of doubt and importance. See *State v. Fowler*, R. I., 83 A. 2d 67. The case is now here after a trial in the superior court.

In my dissent from the opinion filed in the previous case I set out reasons for my view of the section of the ordinance in question. I am still of the opinion that section 11 of chapter 149 of the ordinances of the city of Pawtucket enacted August 17, 1916 is unconstitutional as being contrary to the pertinent provisions of the first and fourteenth amendments to the constitution of the United States. It is unnecessary to restate such reasons as they can be readily

ascertained from an examination of the above-mentioned dissent. In the circumstances I am of the opinion that the defendant should be adjudged not guilty and should be discharged.

Capotosto, J., concurs in the dissenting opinion of Mr. Justice Baker.

[fol. 14] In Superior Court of State of Rhode Island

C.A. No. 31196

State of Rhode Island

vs.

William B. Fowler

Defendant's Bill of Exceptions

Now comes the defendant and files this his bill of exceptions as follows:

(1) An exception to the ruling of the trial court denying defendant's motion to quash the complaint in the instant case, exception to said action appearing on Page 5 of the Transcript.

(2) An exception to the ruling of the trial court denying defendant's motion to dismiss the complaint, exception to said action appearing on Page 21 of the Transcript.

(3) An exception to the ruling of the trial court rejecting defendant's offer of proof appearing on Page 29 of the Transcript, exception thereto appearing on Page 30 of the Transcript.

(4) An exception to the decision of the trial court finding the defendant guilty, exception appearing on Page 57 of the Transcript.

Wherefore, within the time limited by court in defendant's notice of intention to file a bill of exceptions, the [fols. 15-16] defendant files this his bill of exceptions and prays for its allowance pursuant to law.

By his Attorneys, Hayden C. Covington, Aram A. Arabian.

[fols. 17-18] IN SUPERIOR COURT OF STATE OF RHODE ISLAND

[Title omitted]

Transcript of Testimony

Heard before: Mr. Justice Andrews on October 22, 1951.

Jury Trial Waived

APPEARANCES:

Raymond J. Pettine, State Special Counsel for the Prosecution.

Hayden C. Covington and Aram A. Arabian for the Defendant.

Vincent A. Walsh, Court Stenographer.

[fol. 19] Mr. Pettine: If Your Honor please, the State is now ready in the case of State vs. William B. Fowler. I am asking at this time that the defendant be arraigned.

Mr. Arabian: Before the defendant is arraigned, Your Honor, in prior proceedings in this same case the defendant had been given leave to withdraw his plea of not guilty for the purpose of arguing a motion to quash the complaint and before he is required to plead I would ask that that motion be renewed at this time and for that purpose it gives me pleasure to introduce to Your Honor, Hayden C. Covington, Esquire, a member of the New York and Texas bars, who will argue the motion and, with Your Honor's permission, carry on the trial of this case.

The Court: I will admit you to our practice for the purpose of this case and the clerk will note it. Do you make that motion now?

Mr. Covington: I make a formal motion for the sake of the record.

The Court: Has anybody got an extra copy of the Supreme Court opinion?

[fol. 20] Mr. Covington: I have that right here, Your Honor.

The Court: Have you got one left?

DEFENDANT'S MOTION TO QUASH COMPLAINT AND DENIAL THEREOF

Mr. Covington: We had one each. May it please the Court, now comes the defendant before arraignment, and leave of court having been granted to withdraw a plea of not guilty, I make this motion to quash, which we could ask to be later reduced to writing, that we make now for the sake of the record. We say that the complaint ought to be quashed in this case because Section 11 of Chapter 149 of the ordinances of the City of Pawtucket, approved April 17, 1916, is on its face and as construed and applied unconstitutional because it abridges the rights of freedom of speech, freedom of assembly, and freedom of worship, contrary to the first and fourteenth amendments of the United States constitution and Sections 3, 10, and 21 of Article I of the constitution of the State of Rhode Island. Wherefore the reasons stated the defendant moves that the complaint be quashed and the prosecution dismissed. We will reduce that in writing, Your Honor, and file it among the papers. We are ready now to have a ruling, if the Court wants to [fol. 21] rule, and then enter a plea. No argument will be made because the entire matter is covered in the opinion of the Supreme Court which is in possession of Your Honor.

The Court: As I understand this opinion, our Supreme Court has ruled adversely to your contention.

Mr. Covington: That's correct, Your Honor.

The Court: I am governed by our Supreme Court. I will deny the motion and note your exception.

(Defendant's exception noted.)

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Covington: All right, Your Honor. We are ready now to arraign the defendant. Mr. Fowler, will you step up? We will waive the reading of the complaint, Your Honor, and enter a plea of not guilty for the defendant.

Mr. Pettine: Now, if Your Honor please, for the sake of the record I would like to have the defendant state whether or not he waives jury trial in this matter.

[fol. 22] Mr. Covington: Yes, we will. I will say this, that I have discussed the matter of jury trial with Mr. Fow-

ler and informed him fully as to his constitutional right of trial by jury under the constitution of the State of Rhode Island and also the constitution of the United States and I have advised him that we waive the right of trial by jury and he consents to it, may it please the Court.

The Court: I don't doubt but he knows what he is doing. As I understand from the conference we had, you are having this trial to get a record.

Mr. Covington: That's right.

The Court: Have it reviewed by the Supreme Court of the United States.

Mr. Covington: That's right, sir.

The Court: And the result of this trial is more or less a foregone conclusion.

Mr. Covington: That is correct, Your Honor.

The Court: Do you want him to sign a written waiver?

Mr. Covington: I don't think it is necessary to sign it, Your Honor.

[fol. 23] The Court: It is a matter of record.

Mr. Pettine: I think if he makes a personal statement.

The Court: You formally waive the right to a jury trial?

Mr. Fowler: (The defendant) Very gladly, sir.

Mr. Pettine: The State is ready to proceed, Your Honor.

Mr. Covington: We are ready, Your Honor.

Mr. Pettine: If the Court please, this complaint and warrant was made and issued against the defendant, William B. Fowler, on September 3, 1950, which complaint reads that: "on the 3rd day of September A. D. 1950, with force and arms, William B. Fowler, alias John Doe, did violate Section 11 of Chapter 149 of the ordinances of the City of Pawtucket in that he did address a religious meeting in a public park, to wit, Slater Park." For the sake of the record, if the Court please, on October 14, 1950, the defendant in the District Court of the Tenth Judicial District was [fol. 24] adjudged guilty and there he was sentenced to pay a fine of $5.00 and costs. And on that date he duly appealed the sentence to the Superior Court in the County of Providence & Bristol.

On January 15, 1951, the matter was called for hearing and by a leave of the Court the defendant made a motion to dismiss and the question then was certified to the Rhode Island Supreme Court by the late Mr. Justice Walsh.

It is now before Your Honor for a hearing on the facts.

I have here a certified copy of Chapter 149, an ordinance providing rules and regulations for public parks in the City of Pawtucket, in its entirety, including Section 11, the specific section involved, and by agreement of opposing counsel, Mr. Covington and Mr. Arabian, I introduce it in evidence as State's Exhibit either 1 or A as Your Honor wishes to mark it.

The Court: That was in force at the time of this occurrence?

Mr. Covington: Yes, Your Honor, and it also covers and [fol. 25] governs the park where this incident took place on September 3rd, 1950.

Mr. Pettine: And as my brother stated, that was the ordinance in force at the time of this alleged offence.

Further, it is stipulated between Mr. Covington, Mr. Arabian and myself that it is a fact that Slater Park is a public park in the City of Pawtucket.

Mr. Covington: That is correct, Your Honor.

Mr. Pettine: And it is further stipulated that Slater Park does have an area of approximately 194 acres; that within the above area are located tennis courts, Merry-go-round, bandstand, a lake with rental boats, a baseball field, swings and dandles for children, sixteen fireplaces, animal and bird compounds, extensive formal gardens, natural woodlands, and improved roads. Am I correct?

Mr. Covington: This is correct. And also may we add to that that there is space in the park for assemblies of these kinds and that assemblies can be held without interfering with these other activities.

[fol. 26] Mr. Pettine: I will stipulate there is sufficient space in the park, if you wish that. I will go that far.

Mr. Covington: All right.

Mr. Pettine: Now, if Your Honor please, as to what actually took place on this particular day, the facts substantiating the charge, I call to the witness stand Chief Honrigan of the Pawtucket Police.

VINCENT A. HOURIGAN, sworn.

Direct examination.

By Mr. Pettine:

1 Q. Now, Chief Hourigan, you are a member of the Pawtucket Police Department; is that correct?

A. I am.

2 Q. And I call your attention to the date in question of September 3rd, 1950, and ask you if you were a member of the police department on that date?

A. I was.

3 Q. And on that date, Chief, did you have occasion to go to a Slater Park so-called?

A. I did.

[fol. 27] 4 Q. And what time did you get there?

A. At approximately 4:12.

5 Q. And would you please state to the Court where Slater Park is?

A. Slater Park is in the extreme east end of our city.

6 Q. When you say "our city," you mean the——

A. City of Pawtucket.

7 Q. In the State of Rhode Island?

A. That's right.

8 Q. I also ask you whether or not this is a public park?

A. It is.

9 Q. Now, when you got there on this particular day, strike that.

10 Q. Did you state what year that was, Chief?

A. No, I did not. September 3rd, 1950.

Mr. Pettine: 1950.

11 Q. Now, will you state to the Court what you saw when you arrived at the park on that day?

A. Yes, in a large field when I arrived with a number of other police, Mr. Fowler was addressing a gathering of about 400 people.

[fol. 28] 12 Q. Now, I'd like you to stop here, Chief. Mr. Fowler, you say; is he in the courtroom now?

A. Yes, sir, he is.

Mr. Covington: We will stipulate that that is the fact in the case.

Mr. Pettine: You will stipulate that he is the defendant in the case. All right.

13 Q. Will you proceed, Chief?

A. Mr. Fowler was standing in front of a rostrum. There was a microphone at the rostrum and it was connected with two loud speakers, one on either side of him, probably 15 feet to each side of him. On the rostrum was an 8 1/2 by 11 inch looseleaf page book and a bible. He was addressing the gathering and not reading from the script, but looking directly to the people in front of him. The nature of his talk was comparing the present day status of this country with Babylon before its destruction some two thousand years ago. I heard him say something to the effect how futile it was to attempt to obtain peace in the manner they were attempting to obtain it today instead of appealing to the Dove of Peace, Jehovah. About that time I approached him.

[fol. 29] 14 Q. Now, you said, as I understand it, that there were about 400 people?

A. That's approximately, yes.

15 Q. In your opinion, more or less?

A. Yes, sir.

16 Q. And that the Defendant Fowler was addressing these people?

A. That's right.

17 Q. Had a rostrum?

A. Had a rostrum.

18 Q. Had two loud speakers?

A. That's right.

19 Q. These loud speakers or these microphones were working?

A. They were, yes.

20 Q. Now, I think we better have it for the record, he is in the courtroom today?

A. William B. Fowler, that's the man sitting in the seat on the left of Captain Burns.

The Court: B or P?

The Witness: Fowler.

The Court. What is his middle initial?

The Clerk: B.
The Witness: B.

[fol. 30] 21 Q. Now, did you then approach Mr. Fowler?
A. I did.
22 Q. And where did you approach him?
A. At his rostrum.
23 Q. Right there in the park?
A. At his rostrum in the park.
24 Q. What did you do then?
A. I asked him if he had permission to speak at the park and he told me that he didn't need permission. I told him then that I was placing him under arrest for violating a city ordinance. He appeared as though he expected the arrest and he said, "All right."
25 Q. It is not what appeared, Chief, but what actually took place. Now, did he make any statements to you, Chief, with reference to his talk?
A. He did. We brought him to the police station and in my office in the police station he said that he has been a member of Jehovah Witnesses for about 40 years and he has been doing public speaking for them for 38 years; that he was assigned as the speaker of the day for the Pawtucket company of the Jehovah Witnesses and that he prepared his talk of that day on the basis of a speech given by President Truman to the nation on September 1st, and [fol. 31] from scriptures from the St. James translation of the Bible.
26 Q. Now, Chief, did he make any statements——

The Court: —I suppose you mean King James.
The Witness: No, I think he said St. James.

27 Q. Chief, did he make any statement to you as to who these people were, these 400 people?
A. Yes, he did. He said that—he estimated that about 150 were Jehovah Witnesses and the other 250 were there but not Jehovah Witnesses.
28 Q. Did he state whether or not this was a religious meeting?
A. Yes, it was a meeting of the Jehovash Witnesses, yes.

Mr. Pettine: I see.

29 Q. Now,——

Mr. Covington: We'll stipulate to that effect.

Mr. Pettine: You will. Then for the record, Mr. Covington and Mr. Arabian stipulate that this meeting testified to [fol. 32] by Chief Hourigan was, in fact, a religious meeting and that Mr. Fowler did, in fact, address them; is that correct?

Mr. Covington: Yes.

29 Q. (Question continued) Now, was anything further stated?

A. Other than he told me he was an ordained minister of the Jehovah Witnesses. There was much other talk in the office.

30 Q. And were they a peaceful group, Chief?

A. Yes, they were a peaceful group.

31 Q. They were a peaceful group?

A. They were.

32 Q. And it was a peaceful gathering?

A. It was.

Mr. Pettine: You may inquire.

Cross-examination.

By Mr. Covington:

33 Q. Mr. Hourigan, on that subject, there was no disturbance or annoyance to any of the other users of the park, were there, by this speech; he wasn't using obscene or any foul language or attacking any o e, was he, in his speech?

A. There was certainly no obscene or foul language. I didn't hear him attack any one.

[fol. 33] Mr. Covington: All right, sir.

34 Q. And there was no threats of a breach of peace or anything like that, was there?

A. Would you explain that a little more?

35 Q. There was no threat of a breach of the peace, was there?

A. No.

36 Q. Either by him or by any member of the audience?

A. No.

37 Q. Except for his failure to have legal authority to be in the park to make this speech and hold the assembly, it was a lawful and peaceful assembly, was it not?

A. Yes, it was.

The Court: Do I understand, gentlemen, that you can get a license to do what this man did? I notice that the Chief said he asked him if he had a license.

The Witness: No, I said I asked him if he had permission.

The Court: Well, it is the same thing as far as I am concerned.

Mr. Covington: We might say this, we understand that [fol. 34] permission was given on two previous occasions for the holding of this.

The Court: Is there anything in the law that provides for permission to do what he has done?

Mr. Covington: As far as I know, I know of no such permission.

The Court: That ought to be cleared up because it might be well to know when you get upstairs.

Mr. Covington: That's right, but as far as I know there is no law authorizing it but permission was granted on two previous occasions.

The Court: I didn't understand that there was any provision, but in view of the fact that the Chief asked him if he had a permit.

The Witness: That was more or less a figure of speech. I realized when I went there that he could not talk even with a permit. However, there was a little tense feeling as we approached the gathering.

By Mr. Covington:

38 Q. Mr. Fowler was, of course, courteous and polite, I suppose, in all of his dealings?

A. Very much so.

[fol. 35] 39 Q. At the time you got there until you left?

A. He was.

40 Q. Of course—of course, you had had previous dealings with Jehovash Witnesses in respect to the use of the park, had you not, Chief?

A. Did I have? For the two prior weeks, two previous weeks.

41 Q. Previous occasions you found them using the park and ordered them not to use it?

A. On the Sunday prior, yes, on August 28th I stopped them from—stopped them.

Mr. Covington: I believe that's all.

Redirect examination.

By Mr. Pettine:

Mr. Pettine: Just one further question, Chief.

42 Q. You didn't in any way prohibit these people from visiting the park though, did you?

A. No, I did not. It was just from holding a religious meeting.

Mr. Covington: We do not contend that these people entered the park for visiting it or seeing the beauties of [fol. 36] its surroundings, but we stipulate that they went in there for the purpose of holding a lawful and peaceable assembly, and for the purpose of him making an address to this religious gathering.

Mr. Pettine: That's all, Chief.

Mr. Covington: May it please the Court, I am going to state for the sake of the record some facts and it may be that they will be stipulated and save me from having to call three witnesses. I know they are undisputed and if there is any disagreement to them you can so specify and I will have to put on Mr. Fowler as one witness.

We propose for stipulation that on two—three or four weeks before this incident took place on September 3rd, the local congregation of Jehovah's Witnesses——

Mr. Pettine: I am sorry. I don't mean to interrupt, but for the record the State rests after Mr. Hourigan.

The Court: You are making an offer of proof now on what you would prove?

Mr. Covington: I am going to state what I will prove and maybe he will stipulate.

[fol. 37] The Court: Well, of course, you can either put it on—I can say it's no defense or reject your offer as not material.

DEFENDANT'S MOTION TO DISMISS COMPLAINT AND DENIAL THEREOF

Mr. Covington: Probably it will be better to call my witnesses.

I make a formal motion at the conclusion of the State's case and move for dismissal of the complaint because the State has wholly failed to prove any offence and also for the further reason that Section 11 of Chapter 149 of the ordinances of the Ci. of Pawtucket, approved April 17, 1916, on its face and as construed and applied is unconstitutional because it abridges the rights of freedom of speech, freedom of assembly, and freedom of worship, contrary to the first and fourteenth amendments to the Constitution of the United States and Article I of the Constitution of the State of Rhode Island, particularly Sections 3, 10, and 21. That's the formal motion.

The Court: I deny it.

Mr. Covington: All right. Exception.

(Defendant's exception noted.)

Mr. Covington: Now, Mr. Planka, would you please take the stand?

[fol. 38] EDWARD PLANKA, sworn.

Direct examination:

By Mr. Covington:

1 Q. You are one of Jehovah's Witnesses, sir?

A. That's right.

2 Q. You are a minister of the gospel?

A. That's right.

3 Q. And you are associated with the Pawtucket company—congregation of Jehovah's Witnesses known as the Pawtucket Company of Jehovah's Witnesses; is that correct?

A. Right.

4 Q. Now,—rather, before September 3rd, 1950, did you have occasion to deal with the Superintendent of Parks of the City of Pawtucket in reference to an attempt on the part

of Jehovah's Witnesses to get permission to use Slater Park?

A. I did.

5 Q. Please tell about that, who was with you and what occurred?

A. Well, it was in the middle of June, 1950 that Mr. Desroches, sitting right there——

6 Q. Spell his name.

A. D-e-s-r-o-c-h-e-s.

[fol. 39] Mr. Covington: All right.

The Witness: Him and I approached Mr. Corrente. I understand he is the park superintendent of Slater Park.

Mr. Pettine: Your Honor, just for the sake of the record, I feel that I must object on the grounds of materiality.

The Court: Well, I can't see how it is material in view of what the Supreme Court said, but, however, we can't be sure. Perhaps it might be wise to take it. Of course, it isn't the time to object in the middle of an answer.

Mr. Covington: I offer this purely to give the background to the transaction that occurred on the 3rd that's involved here.

The Court: Well, if it is admittedly a religious meeting what more is to be said? I mean legally from a lawyer's point of view.

Mr. Covington: Your Honor, technically speaking, I can see that if we are going to cut it right down to the narrow issue of whether or not the law is valid as construed and applied we can begin with the meeting right there [fol. 40] in the park, but out of the desire to show the entire transaction, lack of wilfullness to violate the law on the part of the defendant and his bona fideness, I am giving the background for that limited purpose, Your Honor.

The Court: I don't imagine that wilfullness is any part of this trial.

Mr. Covington: That is true. I agree with you on that.

The Court: Of course, I don't want to cut off anybody to have a right to review any decision I make or anybody else's. It doesn't seem to me material. I can't sustain the objection in the middle of an answer. It isn't the right

time to make an objection in the middle of an answer. You can finish the answer.

Mr. Pettine: I move to strike it.

Mr. Covington: Would you please finish now about your visit to the Superintendent of Parks?

The Witness: Well, I was asked by Mr. Fornier, the then acting presiding minister of Jehovah's Witnesses in Pawtucket, to see Mr. Corrente about a series of Bible talks [fol. 41] to be held August 20th and 27th. So on that particular day, it was a week day I remember correctly, Mr. Desroches and I went and approached Mr. Corrente and had a discussion with him concerning these talks. We asked directly for permission to have these particular talks at Slater Park. So, Mr. Corrente said, "Why don't you wait until after Labor Day," he said, "you can even have the bandstand."

Mr. Pettine: Well, I object to that. I don't like to object——

The Court: —He is answering.

Mr. Pettine: I have got to adhere to the rules of evidence, Your Honor.

The Court: I know. But you have to adhere to the rules of trial. The question was not objected to. You are objecting in the middle of an answer and all of the answer up to date is responsive. I don't think it makes much difference.

Mr. Pettine: He is telling what Mr. Corrente said.

The Court: I think probably that ought to be eliminated because the question did not call for hearsay, what Mr. Corrente said.

Mr. Covington: Well, Your Honor, in dealing with an [fol. 42] official in reference to the matter you can't very well have dealings without talking and the official is a representative of the City of Pawtucket, a representative of the State of Rhode Island and, therefore, I think there is an exception to the hearsay rule and the hearsay objection is not good. That is my position, Your Honor.

The Court: I will overrule the State's objection. You may proceed.

By Mr. Covington:

7 Q. Go ahead.

A. Well, he gave us permission. We mentioned we wanted two dates, that's August 20th and 27th.

8 Q. All right.

A. And he gave us permission and he also said, "You could even have that spot where the other minister gave a talk a year ago." So, he did give us permission.

9 Q. Where was that spot?

Mr. Pettine: Now, wait a minute. I move that part of it be stricken. It's hearsay as to another minister and what Mr. Corrente said.

The Court: Well, I will overrule your objection. They want to get in the background.

10 Q. Where is the spot?

[fol. 43] A. The spot was not far from Mr. Corrente's home.

11 Q. Is it the spot that was used by Mr. Fowler on the occasion of his arrest September 3rd, 1950?

A. No.

Mr. Covington: No, all right.

The Witness: So, he gave us permission. And I asked Mr. Corrente, "Would you please give me something written out to that effect," and he says, "Well, I'll send it down to your office, or your meeting place," which is 21 Roosevelt Avenue, Pawtucket. We waited for awhile and there was no letter sent to that place. So, again I took Mr. Desroches and went into the City Hall where the Park Commissioner's office was and there was a girl,—lady rather.

Mr. Pettine: If Your Honor please, may I put my objection this way: I think it should be question and answer and not a dissertation on the part of this witness.

The Court: The original question was not objected to and it called for a long narrative and that's what you are getting. I realize that it is hard to object to a long narrative. That's why you should have probably objected to the original question. I think you could ask questions [fol. 44] more profitably. Are you willing to take it up in piecemeal?

Mr. Covington: Yes.

12 Q. Did you have a visit with the commissioner of parks in the City of Pawtucket later; did you or did you not, answer yes or no?

A. Yes.

13 Q. All right. Now, when you went to his office, did you talk to any one there in his office about the use of Slater Park?

A. I did.

Mr. Pettine: I object as not being specific as to what date.

14 Q. Before September 3rd, 1950?

A. I did.

Mr. Covington: All right.

Mr. Pettine: Then, I object to that as being immaterial.

The Court: Before?

Mr. Pettine: Yes.

The Court: I think it is all immaterial myself, but still they want to get it on the record. I don't see that it makes a difference. It is agreed that there is no law giving him—or ordinance or anything—that allows permission to be [fol. 45] given.

Mr. Covington: I am just trying to give the background of the transaction because it was all tied in with conversations that occurred later between the Chief and——

The Court: Does that constitute a defense?

Mr. Covington: It does not.

The Court: I will reject your offer. We might as well cut this down.

Mr. Covington: Let me make an offer of proof.

The Court: Make an offer.

OFFER OF PROOF

Mr. Covington: I make an offer of proof if this witness were permitted to testify he would show that applications were made orally to the Superintendent of Parks as well as to the Commissioner of Parks in the City of Pawtucket in behalf of Jehovah's Witnesses, and permission was actually granted for the holding of meetings on August 20th and August 27th, 1950; and that at sometime subsequent to that the congregation of Jehovah's Witnesses were notified by Chief Hourigan that the law of Pawtucket did

not authorize the use of the park by granting of permits, [fol. 46] and that no religious meetings or assemblies of this kind could be held in the park, and then that notice was given before September 3rd, 1950, on the date that this transaction occurred in Slater Park in the City of Pawtucket.

The Court: You object to that?

Mr. Pettine: Yes, sir, I object.

The Court: Any part of it material, do you claim that statement is defense to this?

Mr. Covington: That statement is just my offer of proof in connection with the exception taken.

The Court: I will reject the offer and give you an exception.

Mr. Covington: All right. That's all. You may step down.

(Defendant's Exception Noted.)

William B. Fowler, sworn.

Direct examination.

By Mr. Covington:

1 Q. Please state your address, sir?

A. I live at 70 Appleton Street, Arlington, Massachusetts. [fol. 47] 2 Q. How long have you lived in the State of Massachusetts?

A. Well, I have lived in Massachusetts now for—let's see—sixty, no, 57 years, 58 years.

3 Q. Where were you born?

A. I was born in New Brunswick. My father moved to this country when I was a mere lad and I have grown up and received my education in the schools of America, United States.

4 Q. And you are a minister, are you, sir?

A. I am a minister, an ordained minister of the gospel, scripturally ordained and I am acting under the direct—the immediate direction of the Watch Tower Bible Society which is the governing body of Jehovah's Witnesses, located at Brooklyn, New York.

5 Q. Are you associated with a congregation of Jehovah's Witnesses?

A. I am, sir, the Cambridge Company of Jehovah's Witnesses, Cambridge, Massachusetts.

6 Q. And did you have occasion to be invited to give a talk as a visiting minister to an assembly in Slater Park here in Pawtucket, Rhode Island, in the year 1950?

A. I did.

[fol. 48] 7 Q. You gave two such talks, did you not?

A. I attempted to.

8 Q. Now, then, when was your first attempt?

Mr. Pettine: I object.

The Court: Well?

Mr. Pettine: Unless it pertains to the question, Your Honor.

Mr. Covington: It is again preliminary, and if we cut it right down to the bone—it could be done legally—but still I think some background ought to be permitted, Your Honor. I will let the matter go.

9 Q. You attempted to give a talk in Slater Park on the 27th of August.

A. I did.

The Court: Is that the date?

Mr. Covington: That is not the date in question.

10 Q. Now, then, following that date, did you respond to a subsequent invitation to give another talk in Slater Park?

A. I did.

11 Q. And what was the date for that?

[fol. 49] A. That was September 3rd, 1950.

12 Q. Now, then, was that in Slater Park?

A. It was.

13 Q. And you agreed to come down to give the talk as a visiting minister to accommodate the Pawtucket congregation of Jehovah's witnesses?

A. I did.

14 Q. Now, what time did you arrive?

A. At the park?

Mr. Covington: Yes.

The Witness: About quarter of four, yes, about quarter of four. The lecture was given at four.

15 Q. What time was the talk scheduled to be given?

A. At 4 o'clock but I began speaking about five minutes earlier than that, about five minutes to four.

16 Q. Now, was the place of assembly a suitable place for an assembly?

A. Very much so, very delightful spot.

17 Q. Tell us about where it was in the park?

A. Well, I don't know as I can do that accurately. As you go into the main entrance where that beautiful pond and the flowers are around, it is sort of a circular affair, [fol. 50] keeping to the left of that and bearing up to the right.

18 Q. You pursued on down on the road further in the circle?

A. We followed the automobile path down about I should judge half a mile. Oh, it was well into the park.

19 Q. Well into the park?

A. Yes.

20 Q. Were there trees there?

A. Yes, many trees, lovely green grass, a good place for people to assemble peacefully to hear the word of God.

Mr. Pettine: I object.

The Court: I will strike out everything after "yes."

21 Q. Now, describe the spot where the assembly gathered?

Mr. Pettine: I object. I don't see the materiality of that either.

Mr. Covington: I am quite sure I can say that that is material, Your Honor, because the purpose of this testimony is to show that it was a proper and suitable spot for the holding of an assembly and to show that it was not in some improper spot in the park and it certainly is part of the res gestae.

[fol. 51] The Court: Any claim of the State that this wasn't a good place for it? I thought that was brought out originally. It is a very fine place for assembly. I thought the Chief said that it was a good place for people to get together. Is there any dispute about it?

Mr. Pettine: We just brought out in the record that it is a public park consisting of 194 acres.

The Court: I will allow it. I will allow the defendant to show that it is a place suitable for people to hear a public address.

Mr. Covington: All right.

By Mr. Covington:

22 Q. Now, will you please describe, having in mind the trees and the grass and the surroundings in the park, and let us know where that was, what part of the park, and describe it?

A. Well, as I have previously stated, it was on the right side of the automobile road that led up into that direction beyond the entrance. About half a mile, I should say, from the entrance. And there were no other gatherings anywhere around that I could see or hear. It was quiet and the crowd had assembled there to hear this lecture that had [fol. 52] been very thoroughly advertised.

23 Q. Now, you—well, tell us, please, whether there—did the assembly take place in the neighborhood where the trees were; was it out in the open sunshine?

A. The rostrum and the sound equipment was placed directly under a large tree so that the sun wouldn't shine directly in my face, but it was a lovely spot.

24 Q. How about the spot where the audience was seated?

A. That was an open grass plot and at the rear of that as I faced it there were trees around that day, too.

25. Q. Did the assembly of people there interfere with the use of the park by other persons?

A. Not that I know of. I didn't see any such thing.

The Court: Were they seated on the grass or standing?

The Witness: Some were seated, sir, and most were standing because there were no benches.

Mr. Covington: Most were standing.

The Court: Any signs there to tell you to keep off the grass?

The Witness: No, sir, not that I could recall.

26 Q. Now, you say the speech that you gave—an assembly to be held had been advertised; do you mean to [fol. 53] say that there had been hand bills circulated?

A. Yes, sir.

27 Q. Advertising it?

A. Many hundreds of them had been circulated throughout the entire city and upon the streets by Jehovah's Witnesses.

28 Q. Now, then, what was the nature of the advertising? I have here a ——

A. —Well, the subject of the talk was "The Pathway to Peace."

Mr. Pettine: I object. I don't see the materiality of the nature of the advertising and the contents of these hand bills.

The Court: Well, I don't know that it is material. It seems to me it might help the State. I don't know that it has any legal significance either. I will allow it.

29. Q. All right, then, using this leaflet here to refresh your recollection, tell the Court what time—what type of advertising was made in the City of Pawtucket before September 3rd, 19——

The Court: That is it apparently.

Mr. Covington: No, it is the other, a week previous. It is the same title though, Your Honor.

[fol. 54] The Witness: Well, during the week previous the Witnesses of Jehovah would assemble on the streets with their magazine bags on the street corner and pass out these flyers to the people and tell them about this meeting, inviting them to come.

30 Q. (Showing witness a sheet of paper) Is it not a printed invitation you hold there offering the people the privilege of hearing this lecture in Slater Park, entitled "The Pathway to Peace," to be delivered by you as a representative of the Watch Tower Society?

Mr. Pettine: I object.

The Court: I will allow it.

Mr. Covington: I am trying to save time, Mr. Pettine.

31 Q. Now, tell us how many people were gathered in the park? You heard Chief Hourigan say about 400; is that approximately right?

A. I agree with what Chief Hourigan said. I won't question his estimate respecting that matter.

32 Q. Some were Jehovah's Witnesses and others were strangers?

A. Approximately 150, I should judge, were Jehovah's Witnesses and the balance, 250, were strangers that had come there to hear the lecture.

[fol. 55] 33 Q. All right. Will you please tell us what occurred after the assembly was brought to order?

A. Well, *after the assembly was brought to order I was introduced as the speaker of the occasion and began my speech, "The Pathway to Peace," I was using President Truman's talk as an illustration of the futility of men's efforts to establish peace by themselves. And then I launched forth into the scriptural evidence to show where we were on the string of time; that we had reached the end of this wicked system of things.* I had spoken about, I should judge, five minutes.

Mr. Pettine: Just a moment.

Mr. Covington: Mr. Pettine makes an objection.

Mr. Pettine: I make a move that be stricken as to the contents of this speech. He made a speech. It was a speech and that's the whole sum and substance of it. What the contents of the speech, or to have the speech in this court this morning, I think adds nothing.

(Last question read by the stenographer)

The Court: Of course, everything in the world is in there since then. He is describing what he did. Do you think it is important? I think I will let him finish but don't elab-[fol. 56] orate unduly. Just get across the general picture.

Mr. Covington: May I say this, Your Honor, in response to the objection that Mr. Pettine has made: Chief Hourigan testified extensively as to what was said by the speaker and I think the evidence would be proper by way of rebutting Chief Hourigan's testimony.

The Court: It doesn't rebut anything. It isn't contradicting anything the Chief said. It was perfectly peaceful.

Mr. Pettine: I withdraw the objection.

34 Q. Go ahead and give us briefly what you have said and cover up to the time—from the time you started the talk until Chief Hourigan stopped you.

A. Well, *I had pointed out that it was a natural desire for all men to want peace; that they had desired that for centuries and they made strenuous efforts down through the centuries to obtain peace. They had failed and failed for an exceptionally good reason, too, and that today instead of peace we have fear and war, trouble and distress amongst the people. It was my purpose to point out from thereon the principal reason why they failed and at about* [fol. 57] *that time I was, within the matter of seconds, surrounded by an impregnable wall of police officers.*

35 Q. Well, how many?

A. Well, I should judge there were about eight or ten of them. They came across the plot of grass on my right. I could see them out of the corner of my eye and I kept right on talking, by Jehovah's grace, *and immediately Chief Hourigan, and in a very courteous manner, approached me and said to me, "Mr. Fowler, have you a permit to give this talk?" I replied, "Chief, you know very well that I need no permit to preach the gospel." I had previously informed him of that fact the week before in the police headquarters; that no nation on earth or city or government can issue a permit to Christians to do something God has commanded them to do, therefore, we need no permit to preach the gospel. And he said then, as he repeated, "I am placing you under arrest for violation of this city ordinance," and I was escorted very courteously to the police car, surrounded by police officers, and taken to headquarters.* Do you wish me to continue?

36 Q. Yes, go ahead. What happened at police headquarters?

[fol. 58] A. Then, I was taken upstairs to Chief Hourigan's office and we sat down to discuss matters with Chief Hourigan and Captain Burns, who, likewise, is here in the courtroom this morning. *I told these two gentlemen that I felt that they had very seriously interfered with the God giving right of Christians in America to exercise their freedom of speech in accordance with the fourteenth amendment of the United States constitution; that we were not there for any evil purpose, but that they knew very well*

we had come to that park for the purpose of doing good and, certainly, the people of Pawtucket need some good instructed into them as well as other cities and towns in the country; and that our sole mission was to exhalt the name of the living God, Jehovah, and tell the people of Pawtucket that His kingdom was at hand; that that kingdom of righteousness is the only possible solution to the world's trouble and is soon to take over and put an end to this terrible condition. I said, "You, gentlemen, instead of interfering with Jehovah's Witnesses in doing this wonderful work, you should be co-operative with us instead of arresting me. You should have stayed at the park and seen that order was observed and that I was given an opportunity to tell the people of Pawtucket God's message.

[fol. 59] The Court: That's what you told him?

The Witness: Yes, sir. And I also backed up my statements by repeated reference to the word of God, the bible. I have my bible right here so I can refer to that very easily.

Mr. Pettine: I don't think that's necessary.

The Court: No, it is a question of place, not of the subject. I don't suppose you insist on coming in here and preaching while conducting a trial?

Mr. Covington: Well, if it happens to be part of the evidence.

The Court: Yes, but how much more? It is just another sermon which I don't object to. I am willing to hear anything, but I don't think it has a bearing on this controversy, really. This was a religious meeting in a public park and the statute specifically prohibited it and the Supreme Court said——

Mr. Covington: It is part of the res gestae that leads up to the filing of the charges and I respectfully submit it is material and could be received. It is not going to run very much longer any how.

[fol. 60] The Court: Go ahead. Finish up what you have to say.

The Witness: Well, my sole purpose in talking——

The Court: —There is a time and place for everything.

The Witness: I might state that my sole purpose in talking to these two gentlemanly police officers in the fashion I did was to drive home to their minds the full realization

of the tremendous responsibility resting upon them for having interferred with this work. That was my sole purpose in talking to them as I did.

37 Q. Didn't you desire to establish in their minds your right to do the work so you might return to it?

A. I certainly did. I plainly pointed out we had a constitutional right and our right had been repeatedly upheld by the United States Supreme Court, repeatedly, on many occasions. And then after talking with them for about an hour and a half, pro and con, the Chief informed me that when arrests were made it was necessary to photograph and fingerprint the criminal arrested and so I was invited to step downstairs to the photograph studio and I sat for a picture; had my picture taken and a nice little [fol. 61] card placed around my neck with a number. I don't know what it was but it was there and then I was fingerprinted for the Rogue's Gallery and then court was called into session shortly after that. Judge—I can't remember his name.

The Court: Connell.

The Witness: Connell, yes, sir. That's correct. Judge Connell was in session and I pleaded not guilty to the charge against me of violating the city ordinance. Judge Connell very courteously allowed me to go on my own recognizance and I did.

The Court: Is it necessary to go further?

Mr. Covington: That's all.

The Court: Any more questions? Any cross examination?

Mr. Covington: That's all.

Cross examination.

By Mr. Pettine:

38 Q. You are a reverend father; is that correct?

A. No, sir, emphatically not. A minister of the gospel, a real minister of the gospel has no title whatsoever.

[fol. 62] 39 Q. I will address you as Mr. Fowler.

A. Thank you, sir.

40 Q. Mr. Fowler, there is no question but what you were there on September 3rd, 1950?

A. Not the slightest.

41 Q. No question but what this meeting was a religious meeting?

A. Yes, sir, that's correct.

42 Q. That it was a religious meeting?

A. It was a religious meeting.

43 Q. There is no question but what you addressed it?

A. I certainly did.

44 Q. There is no question in your mind, is there, that Slater Park is a public park?

A. No, no question about that.

45 Q. There is no question in your mind that these people were not visiting, but rather were assembled there for the holding of a religious meeting?

A. Correct.

46 Q. And in so far as the circulation of these hand bills are concerned to which you testified, can you tell us whether that is confined to the City of Pawtucket or whether it also went beyond the limits of the City of Pawtucket?

[fol. 63] A. Well, I wouldn't be able to say definitely about that, but I would assume that it covered environs within the Pawtucket area, if there are any suburbans to Pawtucket it might have covered them because Jehovah's Witnesses usually go to from door to door with these flyers, too, as well as stand on the streets.

47 Q. In other words, to your knowledge, strike that.

48 Q. In other words, you can't say whether it was actually confined to Pawtucket or not; is that right?

A. I can't, no, sir. I wasn't there.

49 Q. When the flyers were given out. So, whether any of those got into Providence or cities of the State——

A. —I couldn't tell you, sir, a thing about it.

50 Q. You don't know. They may very well have.

A. Maybe so.

51 Q. And whether the people were from Providence or were from Westerly or any party—any part, they were all invited to come to Slater Park in Pawtucket?

A. They were.

52 Q. Is that correct?

A. That's correct.

53 Q. Now, you did say there was a wall of police officers as I recall?

A. I used that term I believe.

[fol. 64] 54 Q. There is no question, is there, Mr. Fowler, they were very courteous?

A. Oh, they were. I couldn't have asked for more.

55 Q. Chief Hourigan has always been courteous?

A. Very much so.

56 Q. Tell me this, Mr. Fowler, do you know whether or not any attempt was made by the members of the Jehovah Witnesses to secure a building for the purpose of your talk upon this particular day?

A. Well, I don't think it was for this talk because they wanted to give this talk in the open. During the summer months we carry on public lectures in the parks all over the United States and in foreign countries as well.

57 Q. Well, is it a fair statement to say to your knowledge no effort was made to get a building or church?

A. I think that is correct.

58 Q. You will say that is correct?

A. Yes, sir.

59 Q. Now, you also made one other statement, Mr. Fowler, you said that you told Chief Hourigan, as I recall it, that instead of arresting you you felt that he should have stayed—co-operated with you and saw to it that order was observed, that's as I recall it.

A. Let me qualify that statement. If there was any occasion for it, order to be observed, put it that way you [fol. 65] will have it right. There was no occasion for it ever.

60 Q. Did you say that?

A. Oh, I did say it.

61 Q. So, in other words, it is fair to assume that, to your knowledge, you didn't know whether there would be order or not, did you?

A. Well, one can never tell. We are not prophets. We can't see the future, any of us.

62 Q. Am I being fair in that you don't know whether there was going to be order or not?

The Court: He said he didn't know what might happen. It is always possible in large assemblies that some person will misbehave.

63 Q. Tell me this, Mr. Fowler, to your knowledge there are auditoriums in the City of Pawtucket, aren't there?

A. I didn't quite get the question.

64 Q. To your knowledge, well, strike it.

65 Q. Let me put it this way: Are you familiar with the City of Pawtucket at all?

A. No, sir.

66 Q. So you don't know what the situation might be as to auditoriums and building?

A. No, I do not.

[fol. 66] Q. Mr. Fowler, you stated that, in your opinion, you know very well that no permit is necessary to preach the gospel?

A. That's correct.

68 Q. Now, do you believe, then, that you have a right to hold a meeting at any place, anytime you see fit?

A. Well, that's rather a catchey question and I will answer it this way: We have a perfect right to hold meetings under conditions suitable for meetings of that kind for religious gatherings. We wouldn't, as Witnesses of Jehovah and law-abiding citizens of this land, take matters into our own hands and deliberately go out into the middle of a public square and hold a meeting. That would be a crazy thing to do. Jehovah Witnesses are Christians and law-abiding citizens, first, last and all of the time. And we will obey every good law that does not contravene the law of God, but when human laws contravene God's law we object.

The Court: Do you claim this is objectionable to the divine law?

The Witness: Yes, I have the law. It reads like this in Matthew 24-14: "This gospel of the Kingdom shall be preached." Jesus, in Matthew 28, He said: "Go you into all the world and make disciples of all men and tell them about God's Kingdom."

[fol. 67] The Court: I just wanted to understand you, if you thought you were the judge of what law should be obeyed.

The Witness: No, sir. Our decisions are guided always by the word of God. That's our guide.

69 Q. Now, Mr. Fowler, then, you readily admit, in your opinion, that you's have no right to go into a trafficated public square to hold a meeting?

A. No, I shouldn't say so, not unless we thought the square was large enough and the police agreed that it would be okay. If they agreed to that, why, and it wouldn't be means of blocking traffic, all right. I know up in Massachusetts in the Town of Natick there is a public park right near the center of town. We had a meeting there, a large meeting, not so long ago. No objection was raised to that.

70 Q. What if it is a trafficated section with traffic in the city, you do admit that you think that would not be a proper place to hold a meeting?

A. Why, I would say it wouldn't be a proper place. It would be noisy, cause confusion, and no particular good could be accomplished that I can see. We much prefer a park where it is quiet and people can assemble peacefully. [fol. 68] 71 Q. You keep qualifying your answers. Now, one of the other reasons, too, would be that it would interfere with the normal flow of traffic and normal traffic of people on the street and disrupt the orderly running of the city; isn't that right?

A. Why, possibly. I don't see what that's got to do with Slater Park.

72 Q. I am not asking you that, Mr. Fowler, I am asking you a question.

Mr. Covington: Well, I don't think we ought to go off into hypothetical questions.

The Court: I don't see much materiality in all this anyway. Of course, the civil law I act to enforce the civil law as I read it regardless of my religious beliefs and if this ordinance—our Supreme Court said it is constitutional—that's all there is to it. I don't see how all this talk has anything to do with it.

Mr. Pettine: He brought it out, Your Honor.

The Court: Any—every order believes they have a right and that they are divinely commissioned to save the world and perhaps, too, take most any means to accomplish that. [fol. 69] I can't pass upon that and I don't intend to.

The Witness: If it please the Court, you asked me a question awhile ago. I'd like to amplify my reply if

I may. There is one scripture that I should have quoted to you. As far as Christians are concerned, the Apostle Peter says, "We are to obey God rather than men." And, so, we operate on that basis; that God's commands are far greater than men's and must be obeyed. Failure to obey God's commands means death to the individual who fails to do so.

The Court: Any more questions of this man?

Mr. Covington: Just one or two questions, Your Honor.

Redirect examination.

By Mr. Covington:

73 Q. Mr. Fowler, Jehovah's Witnesses do have a regular meeting place in Pawtucket; do they not?

A. Oh, yes, indeed, a very splendid place.

74 Q. Where is it located?

A. On Roosevelt Avenue. I think it is 21,—21 Roosevelt Avenue, right near the police headquarters, by the way.

[fol. 70] 75 Q. It is a part of the policy of Jehovah's Witnesses to use open air places like parks in the summer; is that correct?

A. That's correct, only in the summer time or when the weather is of such a nature that it would be profitable.

76 Q. Now, I believe you have stated the police were quite courteous to you on September 3rd.

A. Yes, sir.

77 Q. Were they courteous and nice to you on the week previous when you were taken in?

Mr. Pettine: Objection.

A. They ignored me.

The Court: Sustained.

Mr. Covington: I think it would throw some light on the situation which is different from the interpretation that is left, that the police were quite disorderly and disrupted this meeting and dragged this man to the police headquarters.

The Court: He has his legal remedy. He can sue them. That's the way to vindicate your rights as a citizen against the police.

Mr. Covington: That's true.
The Court: Any more questions?
Mr. Covington: That's all.
Mr. Pettine: That's all.
The Court: That's all.

[fol. 71] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Covington: May it please the Court, the defendant at the close of all of the evidence makes a motion for a judgment of acquittal and for the finding of not guilty. Oh, we rest. I assume there will be no rebuttal.

The Court: Is there any rebuttal?

Mr. Pettine: No rebuttal.

The Court: The defendant rests and there is no rebuttal.

Mr. Covington: I will continue with my motion. I am making a motion briefly and ask leave to state it to the stenographer and later reduce it to writing and file it with the clerk. Will the Court permit me to do that?

The Court: Our pleadings in criminal cases are practically all oral.

Mr. Covington: All right. If it is not necessary, then, I will do it as I did with the motion to quash and the other motion at the end of the State's case and continue. And this is made purely for the sake of the record so that the record will show that we are raising, in these proceedings, the same legal questions that were raised in the certified question, No. 626 in the Supreme Court, State vs. William [fol. 72] B. Fowler, which now comes the defendant at the close of all the evidence and moves the Court for a judgment of acquittal and for finding him not guilty on the grounds that the evidence in this case shows that Section 11 of Chapter 149 of the ordinances of the City of Pawtucket, approved April 17, 1916, on its face and as construed and applied is unconstitutional because it abridges the rights of the defendant's freedom of speech, freedom of assembly and freedom of worship, contrary to the first and fourteenth amendments to the United States constifution and Sections 3, 10, and 21 of the constitution of the State of Rhode Island of Article I.

The Court: We render decisions and not judgments at this point.

Mr. Covington: Yes, Your Honor, I'd like to have the matter corrected and make a motion for decision acquitting the defendant.

The Court: Well, I don't think I need to hear much argument, if you have got it all on the record.

Mr. Covington: I have stated everything I want and I am not going to argue this case. We have already had our argument in these proceedings by going up on the certified question to the Supreme Court.

[fol. 73] DECISION OF COURT

The Court: That's what I assume; that I have nothing to do at this proceeding but to follow the Supreme Court and I am bound by the civil law anyway and when the Supreme Court says a thing it is so with me regardless of my own private views on the matter, and I am not saying that I don't agree with them either. I will deny your motion and I will find the defendant guilty.

Mr. Covington: All right, sir.

The Court: Do you want to waive any motion; you are not going to ask for new trial?

Mr. Covington: We waive a motion for new trial.

Mr. Arabian: I was going to ask before we got further that we have an exception noted to the denial of the motion and to the decision.

The Court: Yes, you may have. You waive your motion for new trial?

Mr. Covington: Yes.

(Defendant's Exceptions Noted.)

The Court: Will the State move for sentence?

Mr. Arabian: I suppose the next thing we will have to do is file our notice of intention within seven days.

[fol. 74] Mr. Pettine: I think we should move for sentence at this time.

Mr. Covington: We don't object to that, Your Honor.

The Court: Well, you move for sentence.

Mr. Pettine: Well, yes, I move for sentence at this time.

The Court: I will sentence him to pay a fine of $5.00.

Mr. Covington: All right. We are taking exception to the Court's decision and also the judgment pronouncing

sentence and we propose to take an appeal to the Supreme Court of this State, of course, which will follow the former certified question and from there we go to the Supreme Court of the United States, and having that thought in mind and desiring to avoid any possibility of the question becoming mute on further appeal, we ask leave of Court to stay execution of judgment and allow us to file a bond for that purpose, pending a final disposition of this case in the higher courts.

The Court: Well, we certainly won't commit the man for not paying right away. You can write out your notice right away.

[fol. 75] Mr. Arabian: Yes, Your Honor. We can file that immediately.

The Court: I am sure the State will co-operate.

Mr. Covington: Your Honor, we would have gone to the Supreme Court of the United States had we the right to do that, but we had no decision to take such step from and so now we have got to go back through and we don't want to have any muteness in the case by payment of fine.

The Court: If there is anything we have done today that you find to be irregular to prevent your going up to the Supreme Court of the United States, we will try to correct it. We want you to have every opportunity to vindicate your rights if you have them.

Mr. Covington: We do not feel that there has been any irregularity committed by the Court. We merely asked that the judgment be stayed on such terms as may be laid down according to the Court and law of Rhode Island so we might appeal.

The Court: I am sure the State won't move to have him committed. You can make it out right away.

[fols. 76-77] The Court: Any further proceeding in this matter?

Mr. Covington: Nothing further, Your Honor.

(Hearing adjourned.)

Stenographer's Certificate to foregoing transcript omitted in printing.

[fol. 78] IN SUPREME COURT OF THE STATE OF RHODE ISLAND

C. Q. No. 626.

STATE

v.

WILLIAM B. FOWLER.

OPINION

CONDON, J.:

This is a criminal complaint which charges the defendant with making a public address to a religious meeting in Slater Park, a public park in the city of Pawtucket, in violation of section 11 of chapter 149 of the ordinances of that city. After trial and conviction in the district court the defendant appealed to the superior court and claimed a jury trial.

When the case was called for trial in the superior court and before a jury was impaneled defendant, by leave of court, moved to quash the complaint on the grounds that the ordinance abridged and denied the rights of free assembly, free speech, and free worship guaranteed by the first and fourteenth amendments to the constitution of the United States and by the constitution of this state. The trial justice declined to rule on the motion because he deemed the constitutional questions thus raised to be of such doubt and importance that they should be certified to this court for our determination pursuant to general laws 1938, chapter 545, §6, as amended by public laws 1940, chap. 941, sec. 2.

Under that statute the superior court is authorized to certify only the questions raised and not the cause itself. *United States Trust Co.* v. *Tax Assessors of City of Newport*, 47 R. I. 420. The trial justice accordingly entered [fol. 79] a formal order certifying the following specific questions:

> "Is Section 11 of Chapter 149 of the ordinances of the City of Pawtucket, approved April 17, 1916, on its face and as construed and applied unconstitutional because it abridges the rights of the defendant to Free-

dom of Speech, Freedom of Association, and Freedom of Worship, contrary to the First and Fourteenth Amendments to the United States Constitution.

"Is Section 11 of Chapter 149 of the ordinances of the City of Pawtucket, approved April 17, 1916, contrary to the provisions of Article I of the Constitution of the State of Rhode Island, with particular reference to Sections 3, 10, and 21."

Since only those questions and not the case are before us we must pass upon the constitutionality of the ordinance without reference to the circumstances out of which the case arose and was originally heard in the district court.

On its face the ordinance, which is hereinafter set out in full in the appendix, prescribes in a series of sixteen sections certain conditions under which any person may lawfully avail himself of the privilege of using the parks belonging to and maintained by the city. One of such conditions is contained in section 11 which defendant is charged with violating. That section reads as follows:

"No person shall address any political or religious meeting in any public park; but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park."

The prohibition therein is not directed at any particular religious group, but is general and applies without question to all such groups and to all political groups as well. [fol. 80] The ordinance as a whole represents an exercise of the power which the city council has over the management and control of municipal property. Apparently in the exercise of that power the city council decided that the city's parks would more certainly serve the purpose of their establishment as areas of rest and recreation if they were not allowed to become forums of either religious or political controversy. This ordinance is not a legislative act of recent origin nor is it specially directed at the activities of the sect which the defendant represents. Rather it is a municipal regulation of long standing as is evidenced by the date of its approval, April 17, 1916, and hence it

antedates by many years the recent prominence of that sect in federal litigation.

We are satisfied that the ordinance was designed not to interfere with freedom of assembly, nor to fetter freedom of speech or prohibit religious worship, but solely to guard the city's parks from being used for activities that reasonably could lead to annoyance and disorder and to that extent defeat the ends for which the city had established the parks as public areas of rest and recreation. The prohibitions contained in the ordinance including section 11 are quite definitely directed to that end. Out of its experience in conducting the prudential affairs of the city, the city council evidently was convinced that public addresses to religious or political groups in the parks would not be consistent with the purpose for which the parks were being maintained at public expense. Viewed in that light the ordinance appears to be a reasonable police regulation, and as such the people of Pawtucket have long acquiesced [fol. 81] in its validity. It is attacked here, for the first time as far as we are aware, thirty-five years after its approval.

The defendant claims that he has a constitutional right to speak in any public park. He concedes that the city may reasonably regulate that right but that it cannot wholly prohibit its exercise. In other words, he asserts not only the right of free speech but also the privilege of a free forum in which to exercise that right. And he contends that he is supported in such view by the highest judicial authority. He relies on a number of recent cases decided by the supreme court of the United States where various kinds of municipal ordinances or administrative practices were held violative of the rights guaranteed by the first amendment to the constitution of the United States and made applicable to the states by the fourteenth amendment. Many of those cases do not involve an ordinance which conditions the lawful use of a municipally owned park upon compliance with certain definite regulations that are not discriminatory. However, some of them do involve such an ordinance or the opinions refer to the right to use such a park. The most important of those cases and the ones upon which defendant appears to rely most strongly are *Hague* v. *Committee for Industrial Organiza-*

ion, 307 U. S. 496; *Schneider* v. *State*, 308 U. S. 147; *Jamison* v. *Texas*, 318 U. S. 413; *Saia* v. *New York*, 334 U. S. 558; and *Niemotko* v. *State of Maryland* and *Knuz* v. *People of the State of New York*, both reported in 19 Law Week 4095 and 4102, and decided by the supreme court of the United States January 15, 1951.

The defendant in his brief has quoted in part from and appears to lay particular stress upon the language of Mr. [fol. 82] Justice Roberts announcing the decision of the court in *Hague* v. *Committee for Industrial Organization*, *supra*, at page 515, as follows: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."

Apparently the learned justice was only speaking for himself and two of his associates. Moreover, we are at a loss to know what was intended by that declaration especially since it was made in essaying a distinction between the case then before the court and *Davis* v. *Massachusetts*, 167 U. S. 43, which upheld the conviction of Davis for preaching on Boston Common in violation of an ordinance like the one in the case at bar. Singularly enough that case was not overruled in the *Hague* case and as far as we are aware has not been overruled, although the court has had occasion to refer to it in several later cases. In the circumstances *Hague* v. *Committee for Industrial Organization*, *supra*, can hardly be considered decisive of the case before us. Incidentally in the later case of *Saia* v. *New York*, 334 U. S. 558, which involved the use of a "loud speaker" in a public park, Mr. Justice Jackson dissented and made the following observation concerning the quotation from Mr. Justice Roberts' opinion in the *Hague* case: "The case of *Hague* v. *C. I. O.*, 307 U. S. 496, cannot properly be quoted in this connection, for no opinion therein was adhered to by a majority of the Court. The quotation in the Court's opinion today had the support [fol. 83] of only two Justices, with a possible third. The failure of six or seven Justices to subscribe to those views

would seem to fatally impair the standing of that quotation as an authority." 334 U. S. 558, 568, Footnote 1. If notwithstanding such criticism, the previously-quoted language of Mr. Justice Roberts in the *Hague* case, *supra*, is to be deemed as binding authority impliedly overruling *Davis* v. *Massachusetts*, *supra*, a great service to state courts would be performed if the supreme court itself would make that overruling clear and definite so that courts would have no reason to be misled in the future. We cannot safely rely upon some other court's interpretation of the language and effect of that case. So long as the *Davis* case stands without being specifically overruled by the supreme court itself, it is difficult for us to say that an ordinance substantially the same as the one involved in the *Davis* case is nevertheless unconstitutional beyond a reasonable doubt.

The defendant, however, points to *Saia v. New York* and *Niemotko v. State of Maryland supra*, decided since the *Hague* case, as clear instances where the supreme court has definitely included public parks, as well as highways, within the orbit of its decisions protecting the freedoms of the first amendment from local abridgment or denial. In each of those cases it is true that the locus of the forbidden act was a public park but there the similarity to the case at bar ends. In the *Niemotko* case there was no ordinance of general application involved but rather an act of arbitrary discrimination by an administrative official. Indeed at the very outset of its opinion in that case the court observed that there was no ordinance regulating the use of the park in question.

[fol. 84] As far as the *Saia* case is concerned the ordinance there prohibited the use of a "loud speaker" device which casts its sound directly upon streets and public places. A public park was only incidentally involved because the defendant set up his "loud speaker" in such a place. He was arrested for using a "loud speaker" in defiance of the ordinance, not for making a public address in the park. The ordinance in question apparently was not invoked by the city to prohibit public addresses to a religious meeting in the park. The court in a five-to-four decision held that the city could not ban the use of a loud speaker in the manner provided in that ordinance because such use was

comprehended within the constitutional guarantee of freedom of speech under the first amendment. It was upon that question that the court split. We do not think that point of decision is relevant to the particular controversy in the case at bar. Moreover the authority of the *Saia* case would seem to be questionable in view of the decision in *Kovacs v. Cooper*, 336 U. S. 77.

In the *Kovacs* case the court upheld an ordinance which prohibited the use of "loud speakers" on the streets and public places of Trenton, New Jersey. Mr. Justice Frankfurter and Mr. Justice Jackson who had dissented in the *Saia* case concurred in the decision and commented adversely on the *Saia* decision. The former said it would be "to start with an unreality" to rest the *Kovacs* decision on that case, and the latter expressly said that *Kovacs* repudiated *Saia*. Three justices who had concurred in the *Saia* decision dissented in the *Kovacs* case and also stated that the decision repudiated the holding in the *Saia* case. Later in *Niemotko v. State of Maryland, supra*, Mr. Justice Frankfurter concurring in a separate opinion said: [fol. 85] "In *Kovacs* v. *Cooper*, 336 U. S. 77, part of the Court construed the ordinance as allowing conviction for operation of any sound truck emitting 'loud and raucous' noises, and part construed the ordinance to ban all sound trucks. The limits of the decision of the Court upholding the ordinance are therefore not clear, but the result in any event does not leave the *Saia* decision intact." And perhaps *Breard v. City of Alexandria*, 19 Law Week 4375, is a further indication of a more restrained approach to the solution of conflicts over local limitations on those freedoms. One of the dissenting justices therein goes so far as to say that such decision overrules certain prior cases in which the court declared invalid certain municipal ordinances as violative of liberty of speech, press and religion. In any event explicit clarification would seem to be necessary if the trial courts are to be given a clear guide for deciding in those cases that legislative enactments are beyond reasonable doubt of conflict with the constitution of the United States.

We are of the opinion that the other cases cited by the defendant afford no stronger support to his contention than those above mentioned and, therefore, we need not discuss

them here. Moreover we are convinced that the case at bar is clearly ruled by *Davis v. Massachusetts*, 167 U. S. 43. The justice of the district court expressly relied upon that case in finding the defendant guilty. Perhaps a brief discussion of its background should be made here because it is obviously a decision that the supreme court of the United States has been reluctant to disturb in spite of language in a number of more recent opinions which might seem to be inconsistent therewith. In our opinion it is a [fol. 86] case more nearly on all fours with the one at bar than any of the cases relied upon by the defendant.

Davis contended that he had a constitutional right guaranteed by the fourteenth amendment to the constitution of the United States to preach the gospel on Boston Common notwithstanding an ordinance which expressly forbade the making of a public address upon any public grounds except by permission of the mayor. The supreme judicial court of Massachusetts in upholding his conviction unanimously held that the ordinance was constitutional. *Commonwealth v. Davis*, 162 Mass. 510. That court held that the constitutionality of the ordinance was not open to doubt and that it was a fallacy to assume that it was "directed against free speech generally * * * whereas in fact it is directed toward the modes in which Boston Common may be used." It is interesting to note that this opinion was rendered by Mr. Justice Holmes.

In a concurring opinion in *Kovacs v. Cooper*, 336 U. S. 77, 95, Mr. Justice Frankfurter said: "The ideas now governing the constitutional protection of freedom of speech derive essentially from the opinions of Mr. Justice Holmes. * * * Accordingly, Mr. Justice Holmes was far more ready to find legislative invasion where free inquiry was involved than in the debatable area of economics." Few will deny the accuracy of this estimate of Mr. Justice Holmes' judicial disposition and his basic influence in promoting this branch of the law to its present state of development. Apparently, however, he was far from ready, despite his solicitude for these precious freedoms, to deprive a municipality of its power to control the use of its own property. [fol. 87] After Mr. Justice Holmes had been elevated to and had served on the federal supreme court for eight years he apparently continued to be of the opinion that state

laws should not be hurriedly overthrown as violative of the bill of rights or the fourteenth amendment. Speaking for a unanimous court in *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110, he said that "we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited by the Constitution of the United States judges should be slow to read into the latter a *nolumus mutare* as against the law-making power."

When *Commonwealth v. Davis, supra*, was appealed by Davis to the supreme court of the United States he contended that the local law under which he was convicted was contrary to the fourteenth amendment to the constitution of the United States. There Mr. Justice White, speaking for a unanimous court, rejected such contention saying: "The Fourteenth Amendment to the Constitution of the United States does not destroy the power of the States to enact police regulations as to the subjects within their control * * * and does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the constitution and laws of the State." And he concluded with the following words, so [fol. 88] apposite in our opinion to the case at bar: "The plaintiff in error cannot avail himself of the right granted by the State and yet obtain exemption from the lawful regulations to which this right on his part was subjected by law." Unless the *Davis* case is no longer the law the ordinance in question here is valid and binding upon the defendant.

Before concluding our consideration of this contention perhaps some reference should be made to defendant's argument that a religious address may be permitted in a public park without contravening the concept of separation of church and state as expounded in the recent case of *McCollum v. Board of Education, Etc.*, 333 U. S. 203.

Defendant has pressed this point at considerable length in his brief and in his oral argument. This appears to be an act of supererogation, as the state is not claiming that the ordinance is valid on the strength of the *McCollum* case, but frankly concedes that the parks may be used for certain religious purposes. We quote the following from page 19 of its brief: "There is nothing in this ordinance, which would prohibit religious services of any kind from being held in the public parks of the City. There is nothing in this ordinance which prohibits or restricts any individual from offering prayer or singing hymns or conducting a religious ritual in the public parks. It is only an address on such an occasion that is prohibited by this ordinance." We are therefore not called upon to decide whether the constitutional doctrine of the *McCollum* case which denies the use of a public school for a period of religious instruction nevertheless permits the use of public parks for religious services.

[fol. 89] Defendant has also contended that section 11 violates the rights guaranteed by sections 3, 10 and 21 of article I of the constitution of this state. Although defendant did not point out those sections specifically in his motion to quash, as he should have done, the trial justice in his order of certification assumes that they are the sections relied upon. We have no hesitancy in saying that insofar as those sections secure the freedoms of assembly, of religion, and of speech, section 11 of the ordinance here in question does not in any true sense violate them.

This court has not given to those guarantees the wide sweep which the federal supreme court in the last decade or two has given to similar guarantees in the first amendment to the federal constitution. Of course we are in complete accord that such rights must be vigilantly guarded not only from direct but also from indirect attacks. Insidious no less than open assaults upon them must be sternly resisted if they are not to be lost by erosion. But we are also aware that true liberty of any kind cannot exist without public order. Preservation of the balance between liberty on the one hand and authority and order on the other has ever been a difficult task for the courts and no less difficult for those immediately charged with the duty of maintaining public order. It should be our constant

concern while safeguarding the first not to go so far as to make unduly difficult or perhaps impossible the discharge of the other.

In such frame of reference we have considered the questions propounded here. As far as our state constitution [fol. 90] is concerned we see nothing contrary thereto in this ordinance. As to the federal constitution we follow the law as declared by the United States supreme court. It has unequivocally declared in *Davis v. Massachusetts, supra,* that an ordinance like the one in the case at bar does not violate that constitution. In no later decision do we find that the supreme court has definitely overruled that case and decided to the contrary. We, therefore, hold on the authority of that case that the ordinance in question does not violate the federal constitution.

Accordingly we answer in the negative each question set out in the order of certification, and the papers in the case are ordered sent back to the superior court for further proceedings.

BAKER, J., dissenting:

I am unable to agree with the majority opinion because in my judgment section 11 of chapter 149 of the ordinances of the city of Pawtucket enacted August 17, 1916 is clearly prohibitory and not in any sense merely regulatory in respect to the right of free speech in a public park in that city. The section does not even contain, for what it may be worth, a provision that a license may be issued by a municipal authority permitting the making of an address in any manner, at any time, or in any place. It may be that other sections of the chapter are regulatory in nature, but they in no way refer to or have any connection with section 11, which is the only portion of the chapter material to the questions before us. Since section 11 is plainly distinct and separable from the rest of the chapter the validity of that section should rest upon its own language without reference to other clearly unrelated provisions of said chapter.

[fol. 91] Also in my opinion *Davis v. Massachusetts,* 167 U. S. 43, upon which the majority of the court relies, cannot properly be held to govern the instant case. While it is true that the above-cited case has never been specifically

overruled by the supreme court of the United States, nevertheless in my judgment that court, in later decisions where it referred to the *Davis* case, has so weakened its effect as an authority that I am unable to accept it as controlling here. Among such decisions are *Hague v. Committee for Industrial Organization*, 307 U. S. 496, *Jamison v. Texas*, 318 U. S. 413, *Saia v. New York*, 334 U. S. 558, and *Niemotko v. State of Maryland*, 19 Law Week 4095. See also *Milwaukee County v. Carter*, 258 Wis. 139, a recent opinion of a state court of last resort. Several of these cases involve the right of free speech in public parks. The general principles of law applicable to the right of freedom of speech and assembly under the first and fourteenth amendments of the constitution of the United States, as set out in such cases and in others, are in substance inconsistent with and contrary to the holding in the *Davis* case.

In addition it may be noted that in *Commonwealth v. Gilfedder*, 321 Mass. 335 (1947), the supreme court of that state, in a case involving the right to make an address on Boston Common contrary to an ordinance of that city and certain rules of the board of park commissioners, held such ordinance and rules to be in conflict with the rights of freedom of speech, of the press, and of assembly guaranteed by the first amendment to the constitution of the United States. At page 342 of that opinion the court makes the following comment: "We confess to difficulty in reconciling the present decision with the decisions in the *Davis* cases. [fol. 92] Nevertheless, we feel compelled to the result now reached by the broad sweep of principles set forth in great amplitude in more recent decisions of the Supreme Court of the United States."

For the reasons stated it is my opinion that section 11 of chapter 149 of the ordinances of the city of Pawtucket is contrary to the pertinent provisions of the first and fourteenth amendments to the United States constitution. I therefore answer in the affirmative the first question certified to us by the trial justice.

In view of the fact that I have construed section 11 of the ordinance to be invalid under the federal constitution, and further as the defendant in his motion to quash did not specifically point out the particular sections of the constitution of this state which he alleges are violated by

section 11, as our well-established practice requires, I am of the opinion that it is unnecessary for me to answer the second question certified by the trial justice.

Capotosto, J. concurs in the dissenting opinion of Mr. Justice Baker.

[fol. 93] APPENDIX

"Chapter 149

Approved August 17, 1916

An Ordinance Providing Rules and Regulations for Public Parks in the City of Pawtucket

It is ordained by the City Council of the City of Pawtucket as follows:

Section 1. No person is allowed to land or take passengers on any boat from the banks of the pond. Any person entering or leaving a boat must do so at the landing provided therefor.

Sec. 2. No person is allowed to occupy the tennis court for more than one hour if other patrons of the Park are waiting to play. While playing on the tennis court patrons must wear shoes without heels or spikes.

Sec. 3. No person is allowed to use profane language in the Park and Ladies and Children must not be annoyed or molested by anyone.

Sec. 4. Slater Park shall be open to the public from sunrise until eleven o'clock afternoon from April first to November first, and from sunrise until ten o'clock afternoon from November first to April first in each and every year; and no person shall enter or be within the limits of said park except between said hours without permission from the Commissioners or Superintendent of Parks.

Sec. 5. No person shall take, pluck, injure, destroy, cut, mark or deface any flower, root, plant shrub, tree, building, fence, monument or other property in any park. No person shall throw a stone or other missile in any park.

[fol. 94] Sec. 6. No person shall ride or drive within any park at a rate of speed exceeding ten miles per hour. No

person shall ride or drive any animal, bicycle or other vehicle except upon the driveways; nor ride or drive any animal, bicycle or vehicle upon other than the right hand side of the driveways, except to cross such driveway or to turn out for some obstruction, or for some animal, bicycle or other vehicle going in the same direction.

Sec. 7. Automobiles, or other vehicles, must not be driven faster than ten miles per hour within the limits of the Park.

Sec. 8. No person shall drive any heavy team, nor any swill or residuum cart, nor any team or carriage for the purpose of business, into any park, without permission from the Commissioners or Superintendent of Parks.

Sec. 9. All vehicles while within the limits of the Park must conform strictly to law regarding lights to be carried.

Sec. 10. No person shall bathe or fish in, nor go into, nor send any animal into, any of the waters of any park, nor disturb any of the fish, birds, water fowl or animals in any park, nor throw or place any article or thing in said waters; provided however, that fishing in any such waters from boats owned by the City of Pawtucket may be allowed by the park commissioners at such times and under such regulations and upon payment of such fees as said commissioners may from time to time prescribe and determine.

[fols. 95-96] Sec. 11. No person shall address any political or religious meeting in any public park; but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park.

Sec. 12. No person, being the owner or having the charge or custody of any dog, cat, fowl, goat, swine or neat cattle, shall allow such dog, cat, fowl, goat, swine or neat cattle to enter any public park or to remain therein.

Sec. 13. No person except in the employ of the commissioners or superintendent of parks, shall light, build or make any fire in any park, square or public grounds.

Sec. 14. No automobile, or other vehicle, shall be permitted to remain stationary in any part of said park for a longer period than ten minutes, except in such locations as shall be assigned for such purpose by the park commission; and any person in charge of such automobile or other vehicle shall at any time, upon the direction of any officer,

immediately remove such automobile or other vehicle to such location as such officer shall direct.

Sec. 15. Any person violating any of the provisions of this ordinance shall be fined not exceeding twenty dollars, or be imprisoned for a term not exceeding ten days for each offense.

Sec. 16. This ordinance shall take effect upon its passage.

[fol. 97] IN SUPREME COURT OF RHODE ISLAND

[Title omitted]

PETITION FOR APPEAL, STATEMENT, ASSIGNMENTS OF ERROR AND PRAYER FOR REVERSAL

Considering himself aggrieved by the final decision by the Supreme Court of Rhode Island in the above entitled cause, the above named appellant hereby prays that an appeal be allowed to the Supreme Court of the United States herein, and for an order allowing same and fixing the amount of the bond thereon.

Statement

This case is one in which the validity of the state legislation is drawn in question, to wit, an ordinance of the City of Pawtucket, Rhode Island, Chapter 149, which, among other things, reads as follows:

> "No person shall address any political or religious meeting in any public park; but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the [fol. 98] auspices of such club or society in such park."

Said ordinance was in force and effect at the time of the facts alleged in the petition for appeal appearing above. It is drawn in question upon the ground that it is repugnant, as enforced by the State, to the First and Fourteenth Amendments to the United States Constitution.

Therefore in accordance with the rules of the Supreme Court of the United States (Rule 46, paragraph 2) and 28 U. S. C. Sec. 1257 (2) and Section 237 (a) of the Judicial Code, the appellant re-pectfully shows this Court that this case is one in which, under the legislation in force when the Act of January 31, 1928 (45 Stat. L. 54) was passed, to wit, under Section 237 (a) of the Judicial Code (28 U. S. C. Sec. 344), a review could be had in the Supreme Court of the United States on a writ of error as a matter of right.

Assignments of Error

Now comes the appellant in the above cause and files herewith, together with his petition for appeal, these assignments of error and says that they are errors committed by the Supreme Court of Rhode Island in the record and proceedings of the above entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States says that the Supreme Court of Rhode Island erred in the judgment affirming the conviction entered against appellant because the ordinance is unconstitutional because, both on its face and as construed and applied, it abridges the rights of freedom of assembly, freedom of speech, and freedom of worship, contrary to the First and Fourteenth Amendments to the United States Constitution and Sections 3, 10 and 21 of Article I of the Constitution of Rhode Island.

[fol. 99] Prayer for Reversal

For and on account of the above errors, the above-named appellant prays that the said judgment of the Supreme Court of Rhode Island, hereinabove described in the above entitled cause be reviewed by the Supreme Court of the United States and reversed, and a judgment rendered in favor of appellant, and for his costs.

Hayden C. Covington, 124 Columbia Heights, Brooklyn 2, New York, Counsel for Appellant.

[fol. 100] IN SUPREME COURT OF RHODE ISLAND

[Title omitted]

ORDER ALLOWING APPEAL—August 19, 1952

The appellant in the above entitled cause having prayed for the allowance of an appeal from the judgment of the Supreme Court of Rhode Island on August 12, 1952, which became final on August 12, 1952, and having presented and filed his petition for appeal, assignment of error, prayer for reversal, and statement as to jurisdiction, pursuant to the applicable rules and statutes,

It is ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States as provided by law, and

It is further ordered that the Clerk of the Supreme Court of Rhode Island shall prepare and certify a transcript of the record herein containing a true copy of all of the material parts which shall be designated by praecipe filed with him by any of the parties hereto, and transmit the same to the Supreme Court of the United States so that the transcript shall reach said Court on or before forty days of this date, and

It is further ordered that execution and enforcement of the judgment and decree entered by the Superior Court and [fol. 101] the decree entered by the Supreme Court of Rhode Island, affirming the judgment of the Superior Court, dated August 12, 1952, in this case be, and the same is hereby stayed pending a final disposition of this appeal in the Supreme Court of the United States; and

It is further ordered that the appellant shall execute a good and sufficient security bond in the sum of Five Hundred Dollars ($500.00), said bond to be subject to the approval of the Clerk of the Supreme Court of the United States.

Felix Frankfurter, Associate Justice, Supreme Court of the United States.

Dated this 19th day of August, 1952.

[fol. 102] Citation in usual form showing service on Raymond J. Pettine—omitted in printing.

[fol. 103] Bond on appeal for $500.00 approved—omitted in printing.

[fol. 104] Notice Calling Appellee's Attention to Rule 12—(omitted in printing.)

[fol. 105] Acknowledgment of Service—(omitted in printing.)

[fol. 106] IN SUPREME COURT OF RHODE ISLAND

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF THE RECORD

To the Clerk of the Supreme Court of Rhode Island:

Please incorporate the following documents into the transcript of the record on appeal to the Supreme Court of the United States, which appeal has been heretofore prayed for and allowed from the final judgment of the Court in the above entitled action, to wit:

1. Bill of exceptions from the Superior Court filed in this cause.

2. Opinion of the Supreme Court of Rhode Island in this case and the former opinion in C. Q. No. 626 in this Court.

3. Final judgment of affirmance by this Court.

4. Petition for appeal, statement, assignments of error and prayer for reversal.

5. All of the docket entries of the Supreme Court of Rhode Island made in this cause from the date of filing the case to the date of the preparing of the transcript here requested.

7. Bond for costs, etc., on appeal to the Supreme Court of
[fol. 107] the United States.
8. Citation.
9. Order allowing appeal to the Supremé Court of the United States.
10. Statement of points to be relied on.
11. Acknowledgment of service by counsel for appellee.
12. This praecipe and proof of service thereof:

Dated at Brooklyn, New York, this — day of August, 1952.

Hayden C. Covington, 124 Columbia Heights, Brooklyn 2, New York, Counsel for Appellant.

[fol. 108] In Superior Court of State of Rhode Island

[Title omitted]

Certification of Clerk

I, John H. Greene, Jr., Clerk of the Supreme Court of the State of Rhode Island and Providence Plantations, hereby certify that the inclosed copies and documents listed either as Superior Court or Supreme Court papers are correct and conformed copies of the originals filed in the case of State of Rhode Island vs. William B. Fowler, Superior Court Criminal Appeal Number 31196, and Supreme Court Exceptions Number 9264. I further certify that the references and transcripts herein contained are accurate and correct transcriptions of the originals as filed and recorded. Appended hereto are the following documents:

(1) Notice Calling Appellees Attention to Rule 12.
(2) Acknowledgement of Service.
(3) Statement of Points Relied On.
(4) Praecipe for Transcript of Record.
(5) Citation.
(6) Order Allowing Appeal.
(7) Petition for Appeal, Statement, Assignments of Error and Prayer for Reversal.
(8) Statements as to Jurisdiction.
(9) Transcript of Testimony.
(10) Defendant's Bill of Exceptions.
(11) Bond.

(12) Stipulation that a Substantial Federal Question is Involved.

(13) Motion and Order for Stay of Execution of Judgment Pending Appeal to Supreme Court of United States.

(14) Advisory Opinion of the Supreme Court of Rhode Island.

(15) Final Opinion of the Supreme Court of Rhode Island.

John H. Greene, Jr., Clerk of the Supreme Court of the State of Rhode Island and Providence Plantations.

[fols. 109-110] [File endorsement omitted]

IN THE SUPREME COURT OF RHODE ISLAND

No. 9264

STATEMENT OF POINTS RELIED ON—Filed August 29, 1952

Comes now the above named appellant in the above entitled cause and states that the only point upon which he intends to rely in the Supreme Court of the United States in this cause is as follows:

The ordinance is unconstitutional because, both on its face and as construed and applied, it abridges the rights of freedom of assembly, freedom of speech, and freedom of worship, contrary to the First and Fourteenth Amendments to the United States Constitution and Sections 3, 10 and 21 of Article I of the Constitution of Rhode Island.

For the above reasons the judgment of the Supreme Court of Rhode Island should be reversed.

Hayden C. Covington, 124 Columbia Heights, Brooklyn 2, New York, Counsel for Appellant.

[fol. 111] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 340

[Title omitted]

DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed November 22, 1952

To the Clerk of the Court:

Now comes the appellant, pursuant to the requirements of paragraph 9 of Rule 13 of the Rules of this Court and designates the parts of the record which he thinks necessary for printing in the consideration of the case:

1. Bill of exceptions from the Superior Court of Rhode Island filed in this cause.
2. Final judgment of affirmance of the Supreme Court of Rhode Island.
3. Petition for appeal, statement, assignments of error and prayer for reversal.
4. All docket entries of Rhode Island Supreme Court.
5. Order allowing appeal.
6. Statement of points to be relied upon.
7. Order of this Court noting probable jurisdiction.
8. This designation of parts of record to be printed.

Dated at Brooklyn, New York, this 21st day of November, 1952.

Hayden C. Covington, Counsel for Appellant.

[fols. 112-113] Proof of Service (omitted in printing).

[fol. 114] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 340

ORDER NOTING PROBABLE JURISDICTION—November 10, 1952

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.